

1           A       That the poles were crowded, and there was  
2 someone waiting to occupy the poles.

3           Q       Well, I believe the test said full  
4 occupancy, but are you saying full occupancy and  
5 crowded are the same?

6           MR. CAMPBELL: Objection, Your Honor. Is  
7 he asking him about the actual language in the case or  
8 his testimony he's just provided? If he's going to  
9 cross-examine him about the case, let's put the case  
10 on the stand. If he's cross-examining him about his  
11 testimony, it's asked and answered.

12          JUDGE SIPPEL: Well, do you understand the  
13 question? Do you understand the concept of full  
14 occupancy and crowded?

15          THE WITNESS: In my testimony, Your Honor,  
16 it's one and the same; crowded and full. I don't draw  
17 a distinction.

18          JUDGE SIPPEL: Okay. I'm going to overrule  
19 the objection. And I think that it is going to be  
20 very confusing to this witness if we jump into and out  
21 of the case.

22               He has testified, and his testimony has

1       been accepted, that he's familiar with the decision.  
2       And we know, we've gone through this in opening  
3       statements to a fare thee well, we know we're cutting  
4       out distinctions between what's got to be decided here  
5       today and what's in the Eleventh Circuit decision.

6               I'm taking this witness' testimony that  
7       he's taking these terms, crowded and full occupancy,  
8       as meaning the same in the context of what this man  
9       does for a living, or what you did for a living until  
10      you retired.

11             THE WITNESS: Yes, sir.

12             JUDGE SIPPEL: Am I assuming that the  
13      correct way?

14             THE WITNESS: Yes, sir.

15             JUDGE SIPPEL: Go ahead.

16             BY MR. SEIVER:

17             Q       Just so I can understand, are you also  
18      saying that within the Gulf Power case that you were  
19      familiar with and read, that you believed those terms  
20      were the same? In spite of what you're testifying to  
21      today, I'm asking you if that was your understanding  
22      of the standard in the Alabama Power case?

1 JUDGE SIPPEL: He doesn't have to testify  
2 as to what the standard of that case was. He's told  
3 you - you asked him a question straight up about full  
4 occupancy or crowded poles, he's going to answer to  
5 the best of his ability. And he can't go beyond that.

6 MR. SEIVER: I didn't want him to, Your  
7 Honor.

8 JUDGE SIPPEL: Well, you were asking him  
9 to, I thought.

10 MR. SEIVER: On page 21 he talks about what  
11 APCO means, and that's his testimony. It says, I  
12 understand that the standard in that case is at issue.  
13 And he says, I can only apply what I think APCO's  
14 language has to mean based on common sense.

15 JUDGE SIPPEL: We're back to where we were.  
16 We're back to square one. You go right ahead. I mean  
17 you can cross-examine him on that statement. But  
18 let's keep it out of the context of pushing him into  
19 that case, or else Mr. Campbell is going to have a  
20 point.

21 The case is there. I mean this is static  
22 information. The case is there. The case holds what

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1 the case holds. The witness knows what he knows based  
2 on facts. He's made it clear on the record what  
3 crowded and full occupancy are.

4 Go ahead, I'm sorry.

5 BY MR. SEIVER:

6 Q Mr. Dunn, you say, I can only apply what  
7 I think APCO's language has to mean. Is there some  
8 problem with what APCO's language says that keeps you  
9 from applying it the way it's written as opposed to  
10 the what it has to mean?

11 MR. CAMPBELL: Objection to form. It's an  
12 argumentative question.

13 JUDGE SIPPEL: Do you understand that  
14 question?

15 THE WITNESS: No, sir, not really.

16 JUDGE SIPPEL: I think you better try it  
17 again, Mr. Seiver.

18 BY MR. SEIVER:

19 Q Mr. Dunn, it stays here on page 21 line 6:  
20 I can only apply what I think APCO's language has to  
21 mean based on common sense. And I think you probably  
22 have another typo here - and real work - did you mean

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1 real world application?

2 A No, I meant work.

3 Q Real work practical application. When you  
4 were saying you could only apply what APCO's language  
5 has to mean, why did you choose that language?

6 A Because to me crowding, it means that -  
7 and fully occupied means the same thing, that there is  
8 no space for another attachment.

9 Q So in your testimony, then, full capacity  
10 would be no space without a rearrangement or make-  
11 ready for another attachment; is that right?

12 A I don't take it as far as changing the  
13 pole out. Because as I read it, it's talking about a  
14 pole. And so crowding to me would be a pole that you  
15 could not rearrange. That pole to make space for  
16 another attachment.

17 Q So it's a pole that could not be  
18 rearranged to make space, would be crowded.

19 A But rearranged does not mean replaced to  
20 me.

21 Q So rearrangeable pole would not be at full  
22 capacity?

1 A I wouldn't think so.

2 Q Now on crowding there had been some  
3 discussion of that with respect to the Osmose audit.  
4 I just want to make sure, you are not testifying about  
5 the Osmose audit? That occurred after you left?

6 A I'm not testifying.

7 Q You didn't look at any of the Osmose  
8 statement of work?

9 A No.

10 Q Now when you had written before, and when  
11 you write later in your testimony about the  
12 replacement costs methodology, you use the term, just  
13 compensation.

14 What is your understanding of the term,  
15 just compensation?

16 JUDGE SIPPEL: Where is that in his  
17 testimony?

18 MR. SEIVER: Page 33, Your Honor.

19 JUDGE SIPPEL: Okay. Did you get to page  
20 33, Mr. Dunn?

21 THE WITNESS: Yes, sir.

22 JUDGE SIPPEL: Can we have a line on that?

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1 MR. SEIVER: I'm sorry, line 14 the  
2 question is: Do you feel that Gulf Power is due just  
3 compensation at a rate higher than the FCC cable rate?

4 JUDGE SIPPEL: Do you see that, Mr. Dunn.

5 THE WITNESS: Yes, sir.

6 BY MR. SEIVER:

7 Q So do you have an understanding of what  
8 the term, just compensation, means?

9 A I understand what it means to me. I  
10 picked it up from the Gulf I case that said we were  
11 due just compensation for the taking.

12 Q Well, what compensation is just in your  
13 mind?

14 A Well, it's fair market value.

15 Q Why do you think that Gulf Power is  
16 entitled to fair market value for the cable operators'  
17 attachment to the pole?

18 A I think that anytime you take someone's  
19 property that they're due fair market value.

20 Q And I know you said you're not a lawyer,  
21 have you read any of the takings cases on just  
22 compensation?

1 A Not other than the ones pertaining here.

2 Q You read the Alabama Power case?

3 A Yes.

4 Q Were you familiar with provisions in that  
5 case that discussed loss to the owner and gain to the  
6 taker, and whether those were elements of just  
7 compensation?

8 A I think the loss to the owner is an  
9 element of just compensation. Our method here does  
10 not calculate a gain to the taker, but I think those  
11 things could be considered.

12 Q I was under the impression, and tell me if  
13 I'm wrong, that the replacement cost methodology does  
14 reflect a value or gain to the taker, does it not?

15 A It reflects - it reflects our cost. There  
16 is no added value for many of the things which I  
17 perceive to be valuable to the taker, such as a  
18 corridor or lightning shield or many of the other  
19 things which are valuable. It is purely the same  
20 method that the FCC uses with current day costs and  
21 pole spacing changes in it.

22 Q And you recall in reading the decisions

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1 that the FCC did not agree that the replacement cost  
2 value of a pole was an appropriate value to use in a  
3 formula for rent; is that correct?

4 A I can't tell you which decisions say that,  
5 but -

6 Q But your testimony today in supporting the  
7 replacement cost methodology would not be consistent  
8 then with any decision that says the replacement is  
9 not proper in the FCC formula?

10 JUDGE SIPPEL: I think that's a little bit  
11 too complex a question, Mr. Seiver.

12 Could you restate a little bit, and raise  
13 your voice a little bit, please?

14 MR. SEIVER: Sorry, Your Honor.

15 BY MR. SEIVER:

16 Q Let me work to it a different way.

17 If I could Mr. Campbell's assistant to put  
18 up the diagram of the pole that had the facilities on  
19 it.

20 JUDGE SIPPEL: What is this technology that  
21 we're using, just so the record is clear?

22 MS. CORBIN: Trial Director.

1 JUDGE SIPPEL: Trial Director? All right,  
2 we're using a Trial Director system, which has a  
3 console in front of counsel table, the witness and  
4 myself.

5 Go ahead.

6 MR. SEIVER: I was hoping I could use this  
7 point, but it's not working. I'm going to have to go  
8 up to it.

9 BY MR. SEIVER:

10 Q Mr. Dunn, looking at this pole, if you  
11 recall, the red space was power space; the yellow is  
12 communications; the light blue, is that where the  
13 cable operator is?

14 A Yes.

15 Q And then the dark blue is the incumbent  
16 ILECs?

17 A ILEC.

18 Q Is that right?

19 A Yes.

20 Q Now we're talking about grounds and  
21 arresters, is this item here considered an arrester?

22 A That is a fuse, a cut out.

1           Q     Is there something else that is an  
2 arrester that is depicted on the pole?

3           A     Yes.

4           Q     Please tell me where it is.

5           A     It's up closer to the pole.

6           Q     There?

7           A     No, that's an insulator. Come down -  
8 there.

9           Q     There.

10           JUDGE SIPPEL: You're talking about a  
11 configuration that is just under the utility power  
12 line; is that right?

13           THE WITNESS: Yes, sir, that's the  
14 arrester.

15           JUDGE SIPPEL: Thank you.

16           THE WITNESS: There's a bracket. There's  
17 an arrester on one end or a cut out on the other, or  
18 a fuse on the other.

19           BY MR. SEIVER:

20           Q     That's the fuse there?

21           A     Yes, sir.

22           Q     Now let's look at this pole and not have

1 the cable operator in that particular space.

2 That wouldn't change how the top of the  
3 pole is configured, would it, with the arresters and  
4 the fuses?

5 A It could impact how closely you put that  
6 equipment. Most of our contracts had 8-1/2 feet. In  
7 order to allow room for the table attachment, that was  
8 reduced to 7-1/2 feet. And so there was a foot taking  
9 out of the spacing, and that could have affected how  
10 closely those - that equipment was mounted.

11 Q But if we took the cable operator off the  
12 pole, you could leave it the way it is, you wouldn't  
13 have to change it?

14 A You could leave it that way, yes.

15 Q And if it was configured this way before  
16 the cable operator came along, and the cable operator  
17 attached, you wouldn't have to change anything?

18 A That's correct.

19 Q Now my question that I want to get back to  
20 is on the replacement cost methodology. The price of  
21 the wooden pole, do you recall that the FCC formula  
22 talks about the net cost of a fair pole?

1 A Yes.

2 Q And do you recall that it's done through  
3 looking at the FERC form 1s and the different accounts  
4 for pole plant, and dividing it, and taking out  
5 depreciation and dividing it by the total number of  
6 poles?

7 A Yes, I think that's correct.

8 Q And the result that it gives in the  
9 formula is the FCC formula rate that we've been  
10 talking about generally that is in the four to five  
11 dollar rate; is that correct as you recall?

12 A That's correct.

13 Q And the - we also discussed that the cable  
14 operator has actually agreed to pay something more  
15 than the FCC's formula rate in the negotiations?

16 A Yes, they have.

17 Q And as far as the attachments are  
18 concerned with the pole, this particular wooden pole,  
19 and we want to assume that it's a 40-foot pole - I  
20 don't remember if it was a 40 or a 45-foot pole -  
21 under your replacement cost methodology you'd want to  
22 substitute the number that it would cost to replace

1 the existing pole if you built a new pole; is that  
2 right?

3 A It's the actual cost from the previous  
4 year for - the average cost for all the 40-foot poles  
5 installed in that year.

6 Q But it's not related to an existing poles'  
7 cost, is that right?

8 A Those poles are now existing, or at least  
9 that is a portion of the poles. But it is the most  
10 current year's average cost.

11 Q You have many poles that have been in  
12 place for 20 or more years?

13 A That's correct.

14 Q And the depreciated book cost on a 20-  
15 year-old pole is considerably less than the current  
16 replacement cost of that pole, right?

17 A That's correct.

18 Q So if this pole were older than a year, it  
19 would be carried on your books as something less than  
20 what the replacement cost is; is that right?

21 A That's correct.

22 Q And in using your replacement cost

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1 methodology, you did not, in trying to set the rate  
2 for the cable operators, take into account whether a  
3 particular pole that a cable operator was one, you  
4 know, was new in one year or another year or 20 years  
5 or 40 years or however old, is that right?

6 A No, sir. It's a foot of space plus  
7 whatever separation is required. And it's applied to  
8 all of them.

9 Q It's applied to every pole that they're  
10 on, regardless of the vintage, is that right?

11 A That's correct.

12 Q Now some of the poles in the - that are  
13 installed for Gulf Power are poles that have been  
14 changed out, is that right, in order to allow a cable  
15 operator to attach, is that right?

16 A That's correct.

17 Q Now when a change out is done by Gulf  
18 Power for a cable operator, who pays the cost of a  
19 change out?

20 A The cost of changing the pole out to  
21 accommodate that attachment, that initial cost is paid  
22 for by the cable company. The future cost of

1 replacing that taller pole is paid for by Gulf Power  
2 Company with no contribution by the cable company.

3 And we had a pole that is adequate there  
4 that is thrown away in this process.

5 Q Despite the fact that a new pole is bought  
6 for you, and recognizing that the thrown away pole.

7 A Yes. But the labor and the material is  
8 lost on the existing pole.

9 Q But the labor and material for the new  
10 pole is fully paid?

11 A That's correct.

12 Q Now, if we look at this particular pole,  
13 and it is one that was paid for by the cable operator  
14 under your replacement cost methodology, you would  
15 still charge the cable operator the replacement cost  
16 rate for its attachment on that pole; is that right?

17 A The replacement cost rate applies to all  
18 the poles. Those that are changed out are a small  
19 percentage.

20 If you're focusing on only the small  
21 percentage of poles that are changed out, and only for  
22 the initial change out. Storm comes, cars come. We

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1 replace the taller pole at our cost, at Gulf's cost.

2 Q Well, those are all booked to various  
3 accounts that go into the FERC forms, aren't they?

4 A That our ratepayers pay for, yes.

5 Q Don't the cable operators make a  
6 contribution every year to those expenses as well  
7 under the formula?

8 A They do not make an initial contribution  
9 for that replacement as they do with make ready the  
10 first time.

11 And then the contribution that they're  
12 making under the FCC formula is only for 7.4 percent  
13 of the pole.

14 Q Now if you look at a pole, for example,  
15 whether it's at full capacity, whether there is more  
16 of this light blue space or not, you're still going to  
17 apply the replacement cost methodology for purposes of  
18 charging the cable operator a, quote, just  
19 compensation, unquote, rate. Is that right?

20 A It applies to all the poles, those that  
21 were make ready poles are a small percentage.

22 Q It would apply to a pole that would not,

1 or did not require any make ready?

2 A The rate?

3 Q Yes.

4 A Yes.

5 Q And it would also apply to a pole that  
6 another attacher, for instance, the incumbent  
7 telephone company, paid to make ready; is that right?

8 A That's correct.

9 Q Actually I was trying to feed into the  
10 next one. I was expecting you to say that the  
11 incumbent phone company that's in this space does not  
12 pay make ready; is that right?

13 A They do in some instances.

14 Q Is it the same amount of make ready that  
15 a cable operator pays?

16 A I'm not - I do not remember all the terms  
17 and conditions of those contracts. But there is a  
18 standard joint use pole that is a 40-foot pole that  
19 has been the standard for many years. And those, if  
20 they request a 40, then they do not. By the same  
21 token, we do not pay make ready. The two situations  
22 are very different, and the method of payment is very

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1 different.

2 With an ILEC it's based on a parity and  
3 each party owning poles, and an understanding that the  
4 company that owns the most poles has the most cost.

5 Q Well, I do want to talk about the ILEC  
6 poles, because I know you discussed that in your  
7 testimony, and we talked about it before.

8 But before I get to that, let's say that  
9 there is another attacher like a Knology that was in  
10 Panama City, a CLEC as we call it, or maybe another  
11 cable operator, if the pole did not require make ready  
12 until Knology, for example, went on the pole. And we  
13 can talk about the Knology make ready, then the cable  
14 operator would still be charged a just compensation  
15 rate based on the fact that the Knology attachment  
16 know is made before we get crowded or full capacity;  
17 is that right?

18 A Based on the space they occupy and a  
19 sharing of the common space.

20 Q So it's really fair to say that your  
21 charge of using the replacement cost methodology as a  
22 just compensation rate applies regardless of whether

1       there is or is not any capacity on the pole for any  
2       more attachments?

3               A       Whether there is an additional attacher  
4       other than the current one that you're talking about?

5               Q       Yes.

6               A       Yes.

7               Q       And that also replacement cost methodology  
8       applies whether or not any existing attacher paid make  
9       ready for a changed-out pole at some point; is that  
10      right?

11              A       It applies to all the poles, yes, sir.

12              Q       Now if we look at the situation where  
13      there is a pole with capacity - and are you testifying  
14      - let me back up.

15                    In your experience are all of the Gulf  
16      Power poles crowded or at full capacity?

17              A       A large number of the poles are at full  
18      capacity, crowded.

19              Q       Now during your tenure up through 2003,  
20      did you have a precise number of those poles in Gulf  
21      Power service territory that were crowded or at full  
22      capacity?

1           A       It wasn't carried on a record as that.  
2       But any joint use pole where the spacing is totally  
3       allocated is at full capacity.

4           Q       But that wasn't every pole in the field;  
5       is that right?

6           A       It's a high percentage.

7           Q       And during the earlier phase of this  
8       proceeding, you don't recall, do you, that you made  
9       any statement in any of your affidavits to the  
10       commission, that the network of Gulf's poles were  
11       crowded or at full capacity?

12           MR. CAMPBELL: I would object. Are you  
13       talking about prior to the APCO, the FCC decision, or  
14       after?

15           MR. SEIVER: His three affidavits were  
16       prior.

17           MR. CAMPBELL: So you are talking about  
18       prior to the standard being announced, did he  
19       incorporate the standard into his affidavits?

20           MR. SEIVER: No, that's not what I asked.

21           MR. CAMPBELL: I think it is, if that is  
22       the timing, Mr. Seiver.

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1 MR. SEIVER: That's not what I asked. I'd  
2 like to ask my question.

3 JUDGE SIPPEL: I'm not going to sustain  
4 that objection.

5 Keep with this witness. Do you understand  
6 what he's asking you?

7 THE WITNESS: Yes, sir.

8 JUDGE SIPPEL: Okay. Can you answer it?

9 THE WITNESS: I did not consider that term  
10 prior to the - it being announced, the term, crowded  
11 or rivalrous. I knew that the pole, if it was a joint  
12 use pole, being a significant percentage were at full  
13 capacity.

14 But I did not call them crowded. I just  
15 knew the space was allocated.

16 Q And you did not base the claim for just  
17 compensation on the replacement cost methodology on  
18 any particular full capacity or crowding of the Gulf  
19 Power pole number?

20 A I based the claim on the taking of the  
21 space.

22 Q Without regard to capacity on a particular

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1 pole?

2 A That's correct.

3 Q Thank you, Mr. Dunn.

4 There was another aspect of the Alabama  
5 Power case that we've discussed, and I want to make  
6 sure it's one that you're also familiar with, about  
7 lost opportunity.

8 Do you remember that?

9 A You'll have to tell me more.

10 Q Forgive me for all the material here.

11 I put up here a quote from the Alabama  
12 Power case that we have been talking about at your  
13 deposition and in our briefing.

14 And if you look at it, I just want to ask  
15 you first if you remember that language from the  
16 opinion, and if you'd like me to give you the opinion,  
17 I can?

18 A It looks familiar, yes, that looks like  
19 it's correct.

20 Q And do you remember when you were doing  
21 your testimony when you were talking about you wanted  
22 to apply APCO's language, were you intending to apply

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1 any of the language from this particular item that  
2 appears on the screen?

3 A Where are you talking about in my -

4 Q In your testimony on page 21. Well, if  
5 you start at line 4 on page 21 is the question. And  
6 it says, quote: Relying on the experience you have in  
7 the joint use industry, do you understand the holding?

8 And your question is, I can only apply  
9 what I think APCO's language has to mean based on  
10 commonsense and real work practical application.

11 And my question is when you say APCO's  
12 language, is this language that you are referring to?

13 A Yes.

14 Q And I wanted to ask you, then, as far as  
15 what your understanding is, we've been talking about  
16 poles at full capacity; is that right?

17 A That's correct.

18 Q You recall that? Now it says before a  
19 company can seek compensation, did you understand that  
20 to be just compensation? If you remember?

21 A No, I did not know that this criterion was  
22 what was required for just compensation.

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1           Q     You did not know that just compensation  
2 would be measured by reimbursement of marginal cost in  
3 the other parts of the opinion?

4           A     I knew that just compensation could be  
5 above marginal cost, but I did not know this other -  
6 that we must show these other things.

7           Q     Well, I thought when I asked you at your  
8 deposition that you did understand there was this test  
9 of showing - demonstrate a pole was fully occupied,  
10 and you had someone else waiting to get on the pole  
11 before you get something more than marginal cost.

12           MR. CAMPBELL: Mr. Seiver, do you have a  
13 page and line reference to the deposition you just  
14 referred to?

15           MR. SEIVER: I do, and you know what I'll  
16 do is, why don't I make this an exhibit, because these  
17 particular pages were not in the excerpts. I  
18 apologize for that.

19           Your Honor, would you like me to mark  
20 these as Complainant's Hearing Exhibit, and use the  
21 sequential numbering so it's the next one so there's  
22 no confusion.